IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-910

OCCIDENTAL OF UMM AL QAYWAYN INC.,
Petitioner,

vs.

CITIES SERVICE OIL CO., *et al.*,
Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The petitioner's statement of questions does not describe the questions which would be presented to this Court if a writ of certiorari were to issue. The questions which would be presented are the following:

1. Whether the complaint presents a political question rather than a case or controversy within the meaning of Article III of the Constitution, when it would require the court:

(a) to resolve a dispute between foreign states (Iran, Sharjah and Umm Al Qaywayn) as to the boundaries of their continental shelf lands in the Persian Gulf (also called the Arabian Gulf), and

(b) to resolve a dispute between Iran and Sharjah as to which one of them was sovereign over the island of Abu Musa, which is located in the Persian Gulf?

2. Whether a court of the United States may entertain a complaint which would require, for the plaintiff to prevail, that acts of the states of Iran, Sharjah, Umm Al Qaywayn and the United Kingdom be declared invalid, and that the reasons for acts of these states be determined?

3. Whether the Hickenlooper Amendment permits inquiry into acts of Iran, Sharjah, Umm Al Qaywayn and the United Kingdom some of which are not alleged to be confiscations in violation of international law?

4. Whether a complaint lies within admiralty jurisdiction where the only maritime tort alleged in the complaint is a "conversion" caused by the production of crude oil from a deposit in the submerged lands of the Persian Gulf and the movement of said oil to a drilling platform permanently affixed to the sea bed?

5. Whether a court may entertain a complaint which if successful would invalidate a concession agreement which was granted by one foreign state (Sharjah) and in which two other foreign states (Iran and Umm Al Qaywayn) enjoy partial interests from the grantor, when none of the three foreign states have been joined as a party?

6. Whether *res judicata* precludes maintenance of a complaint which seeks a declaration of entitlement to oil produced in the Persian Gulf and which calls into question the same acts of foreign states (Iran, Sharjah, Umm Al Qaywayn and the United Kingdom) when a prior judgment in another action held could such acts not be called into question?

7. Whether the plaintiff is collaterally estopped from questioning the reasons for and the validity of acts of Iran, Sharjah, Umm Al Qaywayn and the United Kingdom, in view of the fact that the final judgment in an earlier federal action brought by the same plaintiff in California decided the same issues?

SUMMARY OF REASONS FOR DENYING THE PETITION

The petition should be denied because the Court of Appeals correctly decided that the complaint raised political questions as to the territorial sovereignty and boundaries of foreign states which the federal courts lack jurisdiction to resolve.

The petition is defective because it is based on a fundamental misconception. It assumes that there can be no issues of territorial sovereignty as to Iran or Sharjah, on the theory that those states cannot have continental shelf rights for the island of Abu Musa. In fact, both customary international law and the Convention on the Continental Shelf, TIAS 5578 (Apr. 29, 1958), expressly recognize that islands have continental shelves.

The petition should also be denied because there are five other grounds, not reached by the Court of Appeals, which require judgment for respondents. They are the act of state doctrine, the absence of admiralty jurisdiction (in one case), the absence of indispensable parties, *res judicata,* and collateral estoppel as to outcome—determinative issues.

STATEMENT

This appeal involves three consolidated actions initiated by Petitioner (hereinafter called "Occidental") in the Western District of Louisiana, Lake Charles Division. Two of the actions are based on diversity of citizenship. The third asserts a claim in admiralty. Each action claims title to a different cargo of oil landed at a port in the Western District of Louisiana.

The single cause of action asserted in each complaint is a tort claim for conversion of crude oil. The oil in question was produced from a field in the Persian Gulf on the continental shelf of the island of Abu Musa, nine miles off the coast of the island. Abu Musa is about forty miles from the coastline of the Arabian peninsula, which lies to the south, and fifty miles from the coastline of Iran, which lies to the north. The oil was

produced by respondents in joint venture, in accordance with a concession agreement issued in 1969 by Sharjah to Buttes Gas and Oil Co. (one of the respondents, and hereinafter called "Buttes") and assented to by Iran in 1971.[1] Both Sharjah and Iran claim to own the island of Abu Musa.

The dispute between Iran and Sharjah over Abu Musa is well known and long-standing, having been the source of continued assertions and counter-assertions from at least the nineteenth century. The history of this dispute is reported in official documents of the United Kingdom and of the United States, as well as in scholarly works. Efforts at resolution of the dispute under the auspices of the British government during the period of the British presence in the Trucial States bore fruit on the eve of British departure in November 1971, when, with British approval, Iran and Sharjah entered an agreement. The agreement provided that neither Iran nor Sharjah recognized the other's claim of sovereignty over Abu Musa; that Iranian troops arrive and occupy part of the island; that the island's territorial sea was twelve nautical miles; that exploitation of the petroleum resources of the seabed and subsoil be conducted by Buttes; and that half the government oil revenues be paid directly to Iran and the other half to Sharjah. (Complaint, ¶ NINETEENTH, App. 11-12.)[2]

Occidental's complaint does not claim that Occidental has or had a concession agreement from Sharjah or Iran. It claims

[1] Sharjah was among the seven Trucial States of the Persian Gulf, as to which the United Kingdom exercised certain supervisory powers over defense and foreign relations. The British Forces withdrew on or about November 30, 1971. Thereafter, the Trucial States confederated as the United Arab Emirates.

[2] The British role in bringing about the settlement is described by Sir Colin Crowe, the British Representative to the United Nations Security Council, in an address before the Security Council on December 9, 1971. Records of the 1610th meeting of the Security Council, U.N. Doc. S/PV. 1610, 5, 18-20 (Dec. 9, 1971) (App. 207) (References to the record will be cited to the Appendix page numbers.).

the oil from the disputed area by reason of a concession agreement Occidental obtained on November 18, 1969 from Umm Al Qaywayn (then a Trucial State). That concession, allegedly for the entire continental shelf claimed by Umm Al Qaywayn, included the disputed area nine miles from Abu Musa. Occidental contends that in 1964 Sharjah and Umm Al Qaywayn, with British assistance, agreed by two unilateral declarations to divide the forty mile continental shelf distance between the coastline of Umm Al Qaywayn and Abu Musa, not on usual median-line principles, but by drawing a line three miles off the coast of Abu Musa, thus allegedly giving Umm Al Qaywayn 37 of the 40 miles of their shared continental shelf. Appendix D of the petition, which is a map that is not part of the record in this action, and on which Occidental has written the phrase "clarifying notations, shadings and identifications . . .", is grossly misleading in that it purports to show elements of an agreement totally unsupported by the record. The two declarations referred to by Occidental merely designated coastal points from which lines would be drawn seaward, and the bearings of those lines, and did not mention Abu Musa; did not attach or refer to any map; did not discuss how any island was to be treated; and did not set forth or discuss any frontal boundary between Abu Musa and Umm Al Qaywayn.

Moreover, Iran was not a party to the unilateral declarations by the Ruler of Umm Al Qaywayn or the Ruler of Sharjah, and Occidental does not assert that such declarations, whatever their import, were made on behalf of or were binding upon Iran.

Occidental's concession was cancelled by Umm Al Qaywayn in June 1973 because Occidental failed to make payments provided for by its concession agreement. (App. 13.) This fact is not mentioned in the Petition. The Occidental concession agreement (App. 293-9) provided for arbitration of any disputes between the parties under the guidance of the rules of procedure described in the Rules of the International Court of Justice. Occidental agreed that the concession agreement would have the "force of law" and would be interpreted and

applied in accordance with principles of law recognized by civilized states in general, including those applied by International Tribunals. Occidental makes no claim that it sought to arbitrate the validity of Umm Al Qaywayn's cancellation of the concession.

Litigation between the parties began on June 25, 1970 when Occidental and its parent corporation (Occidental Petroleum Corp.) filed a complaint in the United States District Court for the Central District of California naming Buttes as a defendant. *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972). (That action is hereinafter referred to as the "California action" or the "prior action").[3]

The California action was dismissed by the District Court on the ground that the complaint could succeed only by proof of the invalidity of and the reasons for acts of foreign states, and that such an inquiry was forbidden by the act of state doctrine. The court also held that the complaint did not fall within the Hickenlooper Amendment's exception to the act of state doctrine. (331 F.Supp. 92.) The decision was affirmed *per curiam*, 461 F.2d 1261, *cert. denied*, 409 U.S. 950 (1972).

On November 30, 1971, the United Kingdom withdrew from the Persian Gulf in accordance with its previously announced intentions. Thereupon, in accordance with the prior arrangements between the United Kingdom, Sharjah and Iran, Iranian armed forces entered Abu Musa and were welcomed by representatives of the Sharjah Government. (App. 207 at ¶ 227.)

In April 1972, respondents began drilling operations nine miles off the cost of Abu Musa.

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[3] At the time Occidental filed the California action in the United States District Court it also filed an action in California State Court on the theory of inducing breach of contract. That action was dismissed by Occidental after it had lost the federal court action.

In June 1973, Umm Al Qaywayn terminated its concession agreement with Occidental, because Occidental failed to make the payments required by the concession agreement.

At a time prior to May 1974, according to Occidental, Umm Al Qaywayn and Sharjah entered into an agreement whereby Sharjah would pay Umm Al Qaywayn 30 per cent of Sharjah's revenues from the Buttes concession (App. 306).

In 1974 Buttes and its co-venturers began producing oil from the area. The oil was stored on an anchored storage facility from which it was loaded onto tankers. The first cargo arrived in the United States in September 1974, and was libelled in admiralty.

Occidental filed its first complaint below on September 13, 1974. The complaint asserted that Occidental rather than the respondents had the right to explore and exploit the disputed area off Abu Musa. The complaint alleged that the oil produced from the area belonged to Occidental, and that the oil was tortiously converted when respondents severed it from the seabed. As additional cargoes arrived, new complaints were filed. Some of the complaints purported to assert a tort claim under admiralty law; others, based on diversity of citizenship, purported to assert a tort claim under common law. There is no indication in the complaint as to which country's common law should apply.

In the courts below the respondents urged that five independent grounds supported the motion for summary judgment: (a) the complaint called for inquiry into the reasons for and the validity of the acts of foreign states in violation of the act of state doctrine; (b) the court lacked jurisdiction to determine the claim because to resolve it would require determinations of the territorial sovereignty and disputed boundaries of foreign states; (c) Iran, Sharjah and Umm Al Qaywayn were indispensable because the outcome could materially affect their interests but they were not named as parties; (d) the California action barred the instant action by reason of *res judicata;* and (e) Occidental was collaterally estopped in the instant action from raising outcome-determinative issues which were con-

clusively decided against it in the California action. Respondents separately urged that the admiralty action be dismissed because it stated no claim which would support admiralty jurisdiction.

The District Court granted the motion for summary judgment on the ground that the act of state doctrine precluded an inquiry into disputed acts of foreign states. The admiralty claim was dismissed for lack of admiralty jurisdiction. The opinion of the District Court is reported at 396 F.Supp. 461. The decision dismissing the admiralty claim was not published. The case was appealed to the Court of Appeals for the Fifth Circuit. The Attorney General of the United States, at the request of the Court of Appeals, filed a brief *amicus curiae*. That brief urged affirmance on the ground that the question presented was not a case or controversy within Article III of the United States Constitution, because resolution of the issues would involve political questions that the federal courts had no jurisdiction to decide. The Attorney General urged in the alternative that even if the court had jurisdiction, it should abstain from exercising it in this case. The Attorney General's brief conveyed to the court a letter from the Legal Adviser of the Department of State (hereinafter called the "State Department Letter"), stating that for the court to resolve the boundary disputes at issue in this case would be contrary to the foreign relations interests of the United States. For this Court's convenience, the Attorney General's brief and the Legal Adviser's letter are appended hereto as Appendix A.

The Court of Appeals held that the questions presented as to the ownership of lands disputed by foreign sovereigns were political questions of foreign relations, the resolution of or neutrality on which were committed to the executive branch by the Constitution. Hence, the court held no case or controversy was presented, and thus there was no subject matter jurisdiction. Because it decided that the court was without jurisdiction, the court declined to rule on the non-jurisdictional grounds asserted for affirmance which were common to all three appeal

cases, and did not rule on the question of admiralty jurisdiction which related to one of the three cases on appeal.

The Court of Appeals was correct in holding that there was no subject matter jurisdiction. The result below is also correct because it is independently supported on other grounds not relied upon by the Court of Appeals. The petition should be denied.

ARGUMENT

I. OCCIDENTAL'S CLAIM WOULD REQUIRE JUDICIAL RESOLUTION OF NON-JUSTICIABLE ISSUES CONCERNING FOREIGN SOVEREIGNTY AND BOUNDARIES.

A. Occidental Cannot Maintain A Claim That Respondents Converted Its Property, Since It Cannot Show That It Had A Valid Property Right.

Occidental alleges a property right by reason of the concession granted by Umm Al Qaywayn in 1969 (Pet. 6). Since the maxim *nemo dat qui non habet* ("he who hath not cannot give") is recognized in international law,[4] as well as in American,[5] British,[6] and Islamic law[7], Occidental's claim requires a finding that Umm Al Qaywayn had a property right which could be conveyed to Occidental. Thus, Occidental's case is necessarily premised on the allegation that, in 1969, when Occidental purchased its concession from Umm Al Qaywayn, that state possessed exclusive sovereign rights in the resources of the seabed at the location from which the oil in question was later produced by respondents. This location is between the island of Abu Musa and the mainland, some nine

[4] *See* Island of Palmas Case, 2 U.N. Rep. Int'l Arb. Awards 829, 842 (1928).

[5] *See* Garcia v. Lee, 37 U.S. (12 Pet.) 511, 521-22 (1838).

[6] *See* Broom's Legal Maxims 498 (8th Ed. 1882).

[7] *See* The Mejelle 28, 53-55 (C. Tyse, D. Demetrigdes, & I. Effendi trans. 1967).

miles from Abu Musa and 31 miles from Umm Al Qaywayn. Abu Musa is claimed by both Sharjah and Iran. The oil in question was produced pursuant to an agreement between those two states. Occidental, in effect, asks the Court to determine that neither Sharjah nor Iran, but only Umm Al Qaywayn, had exclusive sovereign rights in seabed resources at this location. Thus, it asks this Court to determine that Iran's claim to Abu Musa is invalid, and that Sharjah's continental shelf claim and its twelve-mile territorial sea claim are invalid.

The waters covering the seabed between Abu Musa and Umm Al Qaywayn have a depth of less than 200 meters, and therefore the seabed is, for legal purposes, "continental shelf."[8] As such, this seabed area is subject to certain sovereign rights of the states adjacent to it. The nature of these rights is articulated in Article 2 of the 1958 Convention on the Continental Shelf, which provides:

> The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

This article states the existing customary law with respect to the nature of the rights which a coastal state enjoys with respect to its continental shelf, *North Sea Continental Shelf Cases,* [1969] I.C.J. 3, 39. Since rules of customary law are binding on all nations, *The Paquete Habana,* 175 U.S. 677, 700, 708(1900), the provisions of Article 2 apply independently of the Convention on the Continental Shelf.

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[8] Article 1 of the 1958 Geneva Convention on the Continental Shelf, TIAS 5578 (Apr. 29, 1958) articulates the rule of customary law that:

> [T]he term 'continental shelf' is used as referring ... to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation ...

1. The Island Of Abu Musa Has A Continental Shelf.

Occidental suggests that this Court presume that the islands of the Persian Gulf may not have continental shelves. That is wrong. Islands, like mainlands, generate continental shelves. Article 1 of the 1958 Geneva Convention on the Continental Shelf provides:

> [T]he term 'continental shelf' is used as referring ... (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

The provisions of Article 1, like those of Article 2, codify existing customary law. *North Sea Continental Shelf Cases,* [1969] I.C.J. 3, 39. Therefore, the rule that islands have continental shelves applies independently of the Convention, and is binding on all states, including those which are not parties to the Convention.

Article 1 also makes clear that the continental shelf, including the continental shelf of an island, extends beyond the territorial sea:

> [T]he term continental shelf is used as referring ... to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea ....

State practice overwhelmingly confirms that islands have continental shelves which embrace seabed areas beyond the territorial sea.[9]

There has been one decision by an international tribunal concerning the extent of an island's continental shelf under customary law. In *United Kingdom of Great Britain and Northern Ireland and the French Republic, Delimitation of the Continental Shelf,* Court of Arbitration (June 30, 1977) (the *English Channel Arbitration),* the arbitral court (having

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[9] See U.S. Department of State, Limits in the Seas Nos. 1, 2, 9-12, 16-18, 24, 25, 42, 55, 56, 58, 62-69, 71-75, 77-80 (various dates, 1970-).

jurisdiction only by consent of the parties) delimited the continental shelf boundary between France and the United Kingdom. (A copy of the arbitration award is located in this Court's library). Part of this boundary involved the United Kingdom's Channel Islands, which are situated on the French side of the Channel (at one point these islands are only six and one-half miles from the French mainland). Applying customary law,[10] the arbitral court held that the Channel Islands, which have a territorial sea of three miles, are entitled to a 12-mile continental shelf.[11] And in the area beyond the Channel, the arbitral court delimited the boundary by means of the equidistance method, giving full effect to the French island of Ushant, and half-effect to the United Kingdom's Scilly Isles.[12] Although this part of the boundary was delimited pursuant to Article 6 of the Convention on the Continental Shelf, the arbitral court said repeatedly that, given the particular geography of the area, application of Article 6 and application of customary law produced the same result.[13]

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[10] *English Channel Arbitration*, at paragraph 147. The Court applied Article 6 of the Convention on the Continental Shelf to other parts of the boundary.

[11] A primary consideration underlying this holding appears to be the fact that the Channel Islands had an established 12-mile fishing zone. *Id.*, at paragraph 176. However, the fact that the United Kingdom had the potential of claiming a 12-mile territorial sea was apparently also relevant. At paragraph 166, the Court said:

> [T]he Court has to take account of the fact that, apart from their three-mile zone of territorial sea the Channel Islands have an existing fishery zone of 12 miles, expressly recognized by the French Republic, and the potentiality of an extension of their territorial sea from three to 12 miles.

Significantly, France did not argue that the islands were limited to their three-mile territorial sea; instead, France argued (unsuccessfully) that the Channel Islands should be given continental shelf rights to a distance of six miles.

[12] *English Channel Arbitration*, at paragraph 251.

[13] *Id.*, at paragraphs 65, 70, 75, 87, 109 and 148.

From the foregoing, it is clear that the island of Abu Musa generates a continental shelf beyond the limit of its territorial sea, whatever that limit is.[14]

2. Abu Musa's Continental Shelf Rights Do Not Depend On Express Proclamation.

Occidental argues that respondents lack standing to assert Abu Musa's continental shelf rights. That argument is misplaced. A nation need not claim its continental shelf rights, or occupy its continental shelf, to preserve its exclusive rights to explore and exploit the shelf's natural resources. Article 2 of the Convention on the Continental Shelf is quite explicit on this point:

> 2. The rights referred to in paragraph 1 of this article *are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.*
>
> 3. *The rights of the coastal State over the continental shelf do not depend on occupation, effective or notion-*

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[14] Occidental incorrectly asserts that respondents did not, until the appeal below, advert to the continental shelf basis of the claims of Iran and Sharjah. Respondents referred to the continental shelf basis of the claims to the disputed territory at the earliest stage of the proceedings in the District Court. See, for example, the statement at page 34 of respondents' Statement of Reasons and Memorandum of Points and Authorities Initial Brief In Support of Motion to Dismiss Action, filed in the District Court on November 6, 1974. (Excerpt attached as Appendix B) "The two concession agreements overlapped, as the complaint indicates, because there is an overlap between Umm Al Qaywayn's continental shelf claim to the area, and Sharjah's territorial sea and *continental shelf claims to the area.*" [Emphasis added.] Similarly, respondents' Reply Brief in the District Court, In Support of Motion to Dismiss or For Summary Judgment filed on April 4, 1975, at 27, (Excerpt attached as Appendix C) stated: "Thus, neither Sharjah nor Iran had to make express claims of continental shelf rights to Abu Musa. *Their long-standing claims to the Island were by themselves sufficient to manifest their claims for its adjacent continental shelf.*" [Emphasis added.]

al, or on any express proclamation. [Emphasis added]

The same rule was announced by the International Court of Justice in *North Sea Continental Shelf Cases* [1969] I.C.J.3, 22 as an expression of customary law:

> More important is the fact that the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it, —namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio,* by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. *In short, there is here an inherent right. In order to exercise it no special legal process has to be gone through, nor have any special legal acts to be performed.* Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised. To echo the language of the Geneva Convention, it is "exclusive" in the sense that if the coastal State does not choose to explore or exploit the areas of shelf appertaining to it, that is its own affair, but no one else may do so without its express consent. [Emphasis added.]

Thus, even the sovereigns themselves do not need to make or manifest a claim to their continental shelves, and there is no need for standing to point out that such claims exist.

In any case, the Department of State Letter reported to the Court of Appeals that the disputed area is continental shelf:

> These considerations are applicable to the question of Umm Al Qaywayn's sovereignty over the *continental shelf surrounding Abu Musa* at the time of the concession to Occidental and to the subsequent arrangements worked out among the affected states. [Department of State Letter, 1; Emphasis added]

In sum, there is no merit to Occidental's suggestion that Abu Musa be presumed not to have a continental shelf.

3. No Position Of The Executive Branch Would Confine Abu Musa's Exclusive Seabed Rights To A Three-Mile Belt Around Its Coast.

Occidental argues that since territorial sea claims greater than three miles are not recognized by the Executive Branch, Abu Musa cannot have any seabed lands outside that belt (Pet. 5). That argument lacks understanding of the law of the sea and the seabed. It confuses two distinct legal notions: territorial sea jurisdiction (sovereignty over the water column) and continental shelf jurisdiction (sovereignty over the natural resources of the seabed). The continental shelf, by definition *begins* where the seaward limit of the territorial sea ends. Article I of the Convention on the Continental Shelf so states as follows:

> For the purpose of these articles, the term "continental shelf" is used as referring (1) to the seabed and subsoil of the *submarine areas adjacent to the coast but outside the area of the territorial sea,* to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands. [Emphasis added.]

If Occidental's view of the law of the sea were correct, the United States would have no right to any submerged lands beyond three miles from our own coast, since the United States claims a territorial sea of three miles. In fact, the United States claims and allows exploitation of its shelf beyond the three-mile limit, as much as 120 to 200 miles from the coastline, in full

consonance with the Convention on the Continental Shelf. Nossaman, Waters, Scott, Krueger & Riordan, Study of Outer Continental Shelf Lands of the United States for the Public land Law Review Commission, 19-21 (1968). With respect to sovereignty over petroleum resources beyond the territorial sea, the United States was one of the first nations in the world to exercise such sovereignty when by the "Truman Proclamation" in 1945, Presidential Proclamation No. 2667, 59 Stat. 884 (Sept. 28, 1945), it declared the following policy:

> [T]he Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas [*i.e.*, beyond the territorial sea] but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.

This Court has given effect to the policy declared in the Truman Proclamation, *United States v. Maine,* 420 U.S. 515 (1975), as has the Congress, in the Outer Continental Shelf Lands Act, 67 Stat. 462, and the President, in the Maritime Boundary Agreement with Mexico (signed May 4, 1978; not yet ratified, XVII International Legal Materials, No. 5 (Sept. 1978) 1073).

Thus, it is clear that the policy of the United States is quite different with respect to a three-mile limit of the territorial sea, and with respect to the law of sovereignty over petroleum resources of the seabed beyond the territorial sea. Occidental's argument that this case could be determined by a three-mile rule is misconceived.

B. To Determine The Territorial Sovereignty And Boundaries Of Foreign States Would Present Political Questions Which May Not Be Resolved By The Judiciary.

This Court's view, announced in *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 164-66 (1803) and reiterated in *Baker* v. *Carr,* 369 U.S. 186 (1962), that political questions are not

justiciable, has found frequent expression in the field of foreign affairs, because of the unique role of the Executive Branch in conducting foreign relations.

In *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 319 (1936), this Court stated:

> Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems the President alone has the power to speak or listen as a representative of the nation.

To like effect are *Oetjen v. Central Leather Co.,* 256 U.S. 297, 302 (1918), and *C. & S. Air Lines Inc. v. Waterman Corp.,* 333 U.S. 103, 111 (1948).

Questions concerning foreign territories and boundaries clearly fall within the sphere of foreign affairs to be handled by the Executive Branch. In holding an alleged grant by the Spanish government insufficient to confer title to certain lands situated in Alabama, this Court said in *De La Croix v. Chamberlain,* 25 U.S. (12 Wheat.) 599, 600 (1827):

> A question of disputed boundary between two sovereign independent nations, is, indeed, much more properly a subject for diplomatic discussion, and of treaty, than of judicial investigation.

And, in *Foster and Elam v. Nielson,* 27 U.S. (2 Pet.) 253, 309 (1829), holding that certain disputed property was ceded by Spain to France under the treaty of St. Ildefonso, and then from France to the United States under the treaty of Paris, the Court said:

> A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of the Legislature.

To like effect are *United States v. Arredondo,* 31 U.S. (6 Pet.) 691, 711 (1832); *Garcia v. Lee,* 37 U.S. (12 Pet. 511, 517 (1838)), and *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.,* 331 F.Supp. 92, 103 (C.D.Ca. 1971), *aff'd,* 461 F.2d 1261 (9th Cir. 1972), *cert. denied,* 409 U.S. 950 (1972).

As Mr. Justice White explained in his opinion (dissenting as to an issue other than political question) in *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 461 (1964):

> Without doubt political matters in the realm of foreign affairs are within the exclusive domain of the Executive Branch, as, for example, issues for which there are no available standards or which are textually committed by the Constitution to the executive.

By footnote 20 at that point Mr. Justice White listed as one of the kinds political matters within the "exclusive domain" of the Executive Branch, issues as to "the territorial boundaries of a foreign state . . . ."

Since the instant case would require determinations as to whether Iran owned Abu Musa, and what was the boundary of the continental shelf of Abu Musa as between Umm Al Qaywayn and either Iran or Sharjah, the Court of Appeals correctly decided that political questions were raised and the court lacked jurisdiction.

That result is also consistent with the position of neutrality maintained by the Executive Branch. Assistant Secretary of State David M. Abshire stated the Executive Branch position in a letter of December 17, 1971 to the Honorable Lee H. Hamilton, Chairman, Subcommittee on the Near East, Committee on Foreign Affairs, United States House of Representatives, as follows (At pp. 203-205):

> The Secretary has asked me to reply to your letter of December 2 requesting comments on the Iranian Landings on the islands of Abu Musa and the two Tunbs in the Persian Gulf on November 30.
>
> The sovereignty of the islands in question has been contested for over a century. *The United States Government, which has never taken a position on the merits of the dispute between Iran and the United Kingdom,* believes that the Iranian landings on the islands must be viewed in the total context of a series of interrelated events in the Persian Gulf in the recent past.
>
> In anticipation of British withdrawal, Iran over a year ago began to press publicly its long-standing claim to the three small Gulf Islands in question. The Iranian insistence on placing garrisons on these islands derived from Iran's concern that otherwise the islands might be used at some point by hostile elements to threaten the flow of Iranian oil to the industrial nations. Iran entered negotiations with the British on the islands question. *The United States Government was not at any time involved in these negotiations nor did it take a position on the merits of the dispute.* [Emphasis added]

That position of neutrality continues to be the foreign policy of the United States, as stated by the Legal Adviser of the Department of State in a May 12, 1978 letter to the Assistant Attorney General James W. Moorman (Appended hereto as Appendix A). The Department of State stated its position as follows:

> We believe that the political sensitivity of territorial issues, *the need for unquestionable U.S. neutrality and the harm to our foreign relations which may otherwise ensue,* as well as the evidentiary and jurisprudential difficulties for a U.S. court to determine such issues, are compelling grounds for judicial abstention. [Emphasis added.]

The Department of Justice, concurring with the Department of State, recommended that the judicial branch abstain from determining the boundary in question, and dismiss Occidental's complaint. Brief for the United States, *Amicus Curiae,* at 7-15, *Occidental of Umm Al Qaywayn v. A Certain Cargo, etc.,* 577 F.2d 1196 (5th Cir. 1978). (Appendix A).

Thus, the foreign policy of the United States, as expressed by the Executive Branch, is to maintain neutrality on the merits of the territorial disputes which Occidental would have an American court resolve.

For the courts to disturb that neutrality would offend the spirit of *Williams v. Suffolk Insurance Co.*, 38 U.S. (13 Pet.) 415, 420 (1839) and *Jones v. United States*, 137 U.S. 202, 212 (1890).

The Court of Appeals was correct in declining to undermine the foreign policy of neutrality as to the boundary and sovereignty disputes here.[15]

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[15] In reaching this result the Court of Appeals did not abdicate its judicial responsibility, as Occidental seems to contend when it states: "It was not law, but a letter, that the Court of Appeals felt compelled it to refuse jurisdiction." Pet., 21.) It was the well-established jurisprudence of the political question doctrine that "compelled" the Court of Appeals to rule as it did. That court's opinion manifests a careful and correct analysis of the political question doctrine. In addition, Occidental charges without that the Court of Appeals dismissed the appeal on the ground of the political question doctrine, not because it believed that a political question existed but because it wanted to accommodate another branch of government. Pet. 20-21. In order to give a wholly misleading impression the petition quotes the opinion out of context.

The paragraph in question (577 F.2d at 1203-04) is set forth below, showing, in italics, the words selected by Occidental in its quotation:

> The ownership of lands disputed by foreign sovereigns is a political question of foreign relations, the resolution or neutrality of which is committed to the executive branch by the Constitution. As has been demonstrated, to determine whether a tortious conversion has occurred, it is necessary to determine the sovereign ownership of the portion of the continental shelf from which the oil was extracted. Although sovereigns are not directly involved, a judicial pronouncement on the sovereignty of Iran or Sharjah would be unavoidable. Such a determination is constitutionally reserved to the executive branch, however. Just as the judiciary will follow an executive determination as to which nation has sovereignty over a disputed area, *United States v. Klintock*, 5 Wheat. 144, 149, 5 L.Ed. 55 (1820), so must the judiciary refuse to decide the dispute in the absence of executive action because of that absence

(footnote continued)

C. The Hickenlooper Amendment Does Not Confer Jurisdiction To Decide Political Questions

Occidental argues that the Hickenlooper Amendment to the Foreign Assistance Act of 1964, 23 U.S.C. §2370(e)(2), provides a jurisdictional basis for this suit. The Hickenlooper Amendment is a statutory limitation on the scope of the act of state doctrine, overturning in part the rule expressed in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). It is Occidental's thesis that the political question doctrine, is just

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(footnote continued)

> of direction. That is, in the language of *Baker v. Carr, supra*, the question of sovereignty is committed to the executive branch by the Constitution, and decision of the issue is impossible in the absence of the executive policy decision. Additionally, *we are persuaded that a judicial determination would reflect a lack of respect for the executive branch, particularly the State Department.* Contained in the Government's amicus brief is a letter from the State Department indicating the importance of neutrality in the politically and economically sensitive Middle East. *A decision in this case, the State Department warns, would seriously impinge on executive neutrality. Therefore, we are convinced that the issue of sovereignty over disputed territory is a political question reserved to the executive branch.*

That selective quotation omits entirely the fundamental conclusion reached by the court that a determination of the sovereignty of Iran and Sharjah was "constitutionally reserved to the executive branch . . ." And, after eliminating the word "Additionally," which introduced the sentence relating to the State Department letter, the petition gives the false impression that the Court of Appeals was dissembling in its statement of reasons for its result. Occidental, after eliminating the word "Additionally," stated that "The very formulation of this sentence" revealed a *non sequitur*. In fact, the sentence contains a *non sequitur* only as recast by Occidental to remove its critical first word, "Additionally." Thus, there is no merit to petitioner's accusation that the Court of Appeals relied upon the State Department letter and not upon the law.

Moreover, in reaching its conclusion the Court of Appeals gave due heed to the six factors identified in *Baker v. Carr*, 369 U.S. 186 (1962), as relevant in ascertaining when a political question is presented. In *Baker* v. *Carr*, this Court held that the inextricable presence of any one or more of those factors shows that a political question is presented.

The Court of Appeals found that in the instant case "nearly every one of the factors is present and the vitality of the political question in

another formulation of the act of state doctrine, and is therefore subject to being overriden by the Hickenlooper Amendment.[16]

The political question doctrine and the act of state doctrine are not one and the same. The term "political question doctrine" is shorthand for the Constitutional limitation on judicial power to cases or controversies. *Baker v. Carr,* 369 U.S. 186 (1962).

In contrast, the act of state doctrine precludes adjudications which the Constitution would not prohibit the federal courts from entertaining. Thus, while the majority and dissenting opinions in *Sabbatino* differ as to how far the act of state doctrine should go in precluding judicial review of acts of foreign states, there is agreement that the doctrine—unlike the political question doctrine—is not constitutionally mandated. "The text of the Constitution does not require the act of state doctrine . . ." *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 423 (1964). Mr. Justice White's dissenting opinion was also explicit in distinguishing political questions from the act of state doctrine. By way of footnote Mr. Justice White's opinion describes as "political matters in the realm of foreign affairs within the exclusive domain of the Executive Branch", issues as to "the territorial boundaries of a foreign state." 376 U.S. 398, 461, n.20.

(footnote continued)
the arena of foreign relations is abundantly demonstrated." 577 F.2d at 1203. The correctness of the Court of Appeals' analysis of the *Baker v. Carr* factors is manifest and needs no amplification here. Practically everything said in the petition reinforces the correctness of the ruling below by demonstrating that Occidental would have the Court run roughshod over the foreign affairs responsibilities of the Executive Branch. As previously noted, the petition would seek the violation of the studied neutrality of our foreign policy vis-a-vis the disputant sovereigns, and would even have this Court declare the juridical status of the submerged lands of more than fifty islands in the Persian Gulf, which islands are parts of the territories of an undetermined number of foreign states.

[16] The various reasons why Occidental is incorrect in its argument that the Hickenlooper amendment would apply to acts of state presented by its claim, are set forth in part II, *infra.*

Moreover, the *Sabbatino* case was a review of a decision of the courts of the State of New York. The act of state doctrine was announced as a principle of federal law binding on state as well as federal courts to preserve the monopoly of the federal government to conduct foreign relations. The Federal Constitution's limits on the extent of federal court jurisdiction are not the same as substantive rules of law applied in state courts.

In limiting the scope of *Sabbatino,* therefore, the Hickenlooper Amendment did not expand the subject matter jurisdiction of the federal courts.

II. THE DECISION BELOW IS INDEPENDENTLY SUPPORTED ON GROUNDS UPON WHICH THE COURT OF APPEALS DECLINED TO RULE.

A. The Act of State Doctrine Precludes Inquiry into the Acts of Foreign States Called into Question by This Action.

1. The Acts Of Sharjah, Iran, Umm Al Qaywayn and The United Kingdom Are Called Into Question.

Occidental claims title and right to the oil on the ground that Umm Al Qaywayn had the valid claim to the disputed area when it granted Occidental a concession in 1969. Occidental alleges that Umm Al Qaywayn's notice of termination was invalid on the ground that Umm Al Qaywayn's sovereignty over the area was suspended in fact, as a result of the various alleged acts of Sharjah and Iran described in the Complaint.

The complaint would have the court determine that the cause of Iran's claim to the island of Abu Musa was an inducement by Buttes and Sharjah, "purely for the purpose of interfering with plaintiff's vested right . . ." (Complaint, ¶ FIFTEENTH, App. 9.) It would have the court declare that Iran and Sharjah annexed the territory of another foreign state; that Occidental's absence of possession and lack of drilling since June of 1970 was forced upon it by reason of a directive from Umm Al Qaywayn and by reason of British Royal Navy

interdiction of Occidental's tug and drilling rig; that Umm Al Qaywayn was acting under the direction of the British Political Agent; and that the motivation of the British Navy was to discharge Great Britain's treaty obligations.

The complaint charged that the so-called annexation, "constitutes a confiscation of plaintiff's property rights in violation of international law." (Complaint, ¶ TWENTY-SECOND, as amended by SUPPLEMENTAL AND AMENDED COMPLAINT, App. 14, 19.)

District Judge Hunter's description of the complaint is most apt: "The entire fabric of the complaint is woven out of attacks on the validity of, or questioning the reasons for, the acts of Sharjah, Iran and Umm [Al Qaywayn] with respect to the precise rights which plaintiff asserts." (App. 337-38, 396 F.Supp. at 469.)

2. The Act Of State Doctrine Bars Inquiry Into the Acts of State Called into Question By The Complaint.

In *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 416 (1964), this Court referred to the "classic American statement" of the act of state doctrine found in *Underhill v. Hernandez,* 168 U.S. 250 (1897), where Chief Justice Fuller said for a unanimous court (168 U.S. at 252):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Our courts have consistently refused to be drawn into questioning the acts of foreign states. *American Banana Co. v. United Fruit Co.,* 213 U.S. 347 (1909). In *Ricaud v. American Metal Co.,* 246 U.S. 304, 309 (1918), the Court stated:

> It is settled that . . . the courts of one independent government will not sit in judgment on the validity of the acts of another done within its own territory . . .

This Court's most recent decision on the act of state doctrine is *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682 (1976). The court requested and heard argument on the question of whether the Court's holding in *Sabbatino* should be reconsidered. The case was disposed of without reaching the *Sabbatino* issue because five members of the Court held that the action at issue—a statement by counsel for an agency of the Republic of Cuba that this agency would refuse to return certain monies owed to an importer—was not proof of an act of state. (Opinion of the Court, delivered by Mr. Justice White, Parts I, II, 425 U.S. at 684-695). Three of this majority (The Chief Justice, Mr. Justice Powell, and Mr. Justice Rehnquist) joined in Part III of Mr. Justice White's Opinion, which would limit the scope of *Sabbatino,* so as not to apply the act of state doctrine to acts committed by foreign sovereigns "in the course of their purely commercial operations." 425 U.S. at 706. Mr. Justice Stevens concurred only as to Parts I and II of Mr. Justice White's Opinion. 425 U.S. at 715. According to Mr. Justice Marshall's dissenting opinion, joined by Mr. Justice Brennan, Mr. Justice Stewart, and Mr. Justice Blackmun, 425 U.S. at 715-737, the action in question qualified as an act of state within *Sabbatino,* and the *Sabbatino* rule should not be restricted to exclude "commercial" acts. No member of the Court advocated complete abolition of the act of state doctrine. That doctrine, as viewed by every member of the Court, would embrace the acts of state in question here. First, the acts of Iran, Sharjah, Umm Al Qaywayn and the United Kingdom are acts of sovereigns. Second, the acts of sovereigns in claiming their territories and exercising sovereign rights to their seabed minerals are not purely commercial acts. Finally, this is surely a case, as envisaged by Mr. Justice Powell, where "an exercise of jurisdiction would interfere with delicate foreign relations con-

ducted by the political branches . . ." 425 U.S. at 715, quoting from Mr. Justice Powell's concurring opinion in *First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 775-776 (1972).

A case in point is *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92 (C.D. Cal. 1971), *aff'd* 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972), where the Court of Appeals affirmed the judgment of dismissal for the reasons stated by District Judge Pregerson below. Judge Pregerson held that the complaint by Occidental called into question acts of state [many of which are challenged here] as a necessary predicate to establishing a right to the same oil concession off the island of Abu Musa.

To the same effect is *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977), *cert. denied* 434 U.S. 984 (1978). The court held that it could not, consistent with the act of state doctrine, entertain a count of a complaint questioning reasons for the acts of Libya in reducing oil production of an American petroleum entrepreneur, in shutting off his supply, and in nationalizing his property. The court described an inquiry by the American judiciary into the "subtle and delicate issue of the policy of a foreign sovereign", as a "Serbonian Bog." 550 F.2d at 77.

The judgment below would have been correctly decided on act of state grounds if the Court of Appeals had reached that issue.

3. The Hickenlooper Amendment Does Not Permit Inquiry Into The Acts Of States Called Into Question In This Case.

The Hickenlooper Amendment to the Foreign Assistance Act of 1964 (sometimes called the "Sabbatino" amendment), 22 U.S.C. §2370(e)(2), is a careful Congressional declaration of a limited exception to the act of state doctrine.

The amendment was designed to overturn in part *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), which held that the courts of the United States would not inquire into the validity under Cuban law of acts of expropriation by the Castro government. An account of the legislative history of the

Hickenlooper Amendment is given in *Banco Nacional de Cuba v. First National City Bank*, 431 F.2d 394, 399-402 (2d Cir. 1970), *judgment vacated and case remanded for consideration of State Department letter*, 400 U.S. 1019 (1971), *adherence to prior decision announced*, 442 F.2d 530 (2d Cir. 1971), *reversed and remanded on non-Hickenlooper grounds*, 406 U.S. 759 (1972), *rehearing denied*, 409 U.S. 897 (1972).

a. The Hicklenlooper Amendment Does Not Apply To The Alleged Refusal Of Iran And Sharjah To Recognize Occidental's Concession.

Occidental alleges that Sharjah and Iran's refusal to recognize Occidental's concession constituted a confiscation, the premise being that Occidental had property which could be recognized. That premise is false. *First*, Occidental could get no better title than its grantor, Umm Al Qaywayn, had. Whether Occidental had property demands on whether, when it received the concession, Umm Al Qaywayn had property to convey. But whether Umm Al Qaywayn had any property to convey is itself a question which the court cannot resolve because of the political question doctrine and the act of state doctrine. *Second*, it is well settled, as the Court of Appeals noted, that interests conferred by a sovereign in lands which are claimed by another sovereign are taken subject to resolution of the boundary dispute between the sovereigns. 557 F.2d at 1202. *Poole v. Fleeger*, 36 U.S. (11 Pet.) 185 (1837); *Garcia v. Lee*, 37 U.S. (12 Pet.) 511, 521 (1838) and *Coffee v. Groover*, 123 U.S. 1, 29-30 (1887).

The cases cited above show that a title to land conveyed by a *de facto* sovereign in an area in dispute does not bind the succeeding sovereign. If it is determined that the territory belongs to the succeeding sovereign, the grant is invalid because the *de facto* sovereign could convey no better title than it had.

Moreover, Occidental has stated that the annexation of the disputed area is an accomplished fact. Whether one characterizes the event as an "annexation," as Occidental does, or simply as the manifestation of authority over land always owned, it is

clear that the three states involved have resolved their differences to the extent of allowing respondents to proceed. This is a classic example of one of the rules of *Poole v. Fleeger,* i.e., that when the states resolve a boundary dispute among themselves, they can rightfully decide which titles to recognize among those conferred during the period of the dispute.

Occidental's attempt to invoke Hickenlooper fails because it does not violate international law for sovereigns, in settling their disputes as to boundaries, to recognize the title of the grantee of one state rather than the title of the grantee of another. As a matter of law, the foreign disputant states' recognition of respondents as the grantee does not constitute a confiscation in violation of international law.

b. The Hickenlooper Amendment Does Not Apply to an Alleged Confiscation of Contract Claims.

The Hickenlooper Amendment is not applicable to alleged confiscations of contract claims, but only to claims to "property." By Section 301(d) (2) of Public Law 89-171 (September 6, 1965), Congress revised the 1964 Hickenlooper Amendment by inserting the words "to property" in two sections, in order to clarify the word "right." 79 Stat. 6659 (1965). The statute was changed to require "a claim of title or other right to property." (Emphasis added.)

With respect to the 1965 modification, *French v. Banco Nacional de Cuba,* 23 N.Y.2d 46, 61-62, 295 N.Y.S. 2d 433, 448 (1968) stated:

> . . . Congress decided to eliminate *all* contract claims from the statute rather than attempt the more subtle task of distinguishing between contract cases in which the act of state defense might be asserted and those in which it might not. Judge Keating may disapprove of Congress' choice of a method for accomplishing its purpose, but that choice — by the plain evidence of the 1965 amendment and of the accompanying Senate Report — is the one that was made, and it is binding upon us.

The Hickenlooper Amendment is not, as Occidental urges, a judicial warrant to inquire into alleged confiscations of contractual claims by acts of state.

B. Civil Action No. 74-868 Was Not Cognizable Under the Court's Admiralty Jurisdiction.

Occidental had styled Civil Action No. 74-868 as arising within admiralty jurisdiction. The district court ruled that regardless of how the matter was denominated, the suit was in fact initiated to establish title to a cargo of crude oil, and thus alien to traditional maritime interests. The *sine qua non* of an action in admiralty with respect to cargo is the existence of a maritime port or contract.

There is no allegation of any contractual relationship between Occidental and any of the respondents, and a concession for the drilling for oil cannot be considered a maritime contract. See *Silver v. Sloop Silver Cloud,* 259 F.Supp. 187, 190 (S.D.N.Y. 1966), citing *General Engine & Machine Works, Inc. v. Slay,* 222 F.Supp. 745, 747 (S.D.Ala. 1963). Admiralty jurisdiction, if it were applicable here, would have to rest on the existence of a maritime tort.

Conversion is the sole tort alleged in the complaint, viz; the oil was "wrongfully and tortiously taken" (Complaint, ¶ SECOND, App.2).

The facts do not support maritime tort jurisdiction. The alleged conversion did not take place on navigable waters and was not of a traditional maritime nature. The cargo in issue is crude oil produced from the subsoil below the seabed, and the equipment used in producing this oil was located on a fixed platform with legs imbedded deep into the soil beneath the Persian Gulf. As found by the District Court, the alleged conversion was not of a traditional maritime nature.

The admiralty action was therefore properly dismissed by the District Court.

C. The Judgment Below Is Correct Because of The Absence of Iran, Sharjah and Umm Al Qaywayn, Which Are Indispensable Parties.

Respondents' oil concession was granted by Sharjah and consented to by Iran, each of which claims the territory and receives one-half of the payments for oil production. The third claimant to the territory, Umm All Qaywayn, shares in Sharjah's revenues from the production of oil. The relief sought by Occidental would vitiate respondents' concession agreement. The relief sought would therefore materially affect three foreign states, none of which is joined as a party.

Rule 19 of the Federal Rules of Civil Procedure sets forth criteria for determining when, in the absence of a party (Fed.R.Civ.P. 19(a)) "in equity and good conscience the action would proceed among the parties before it . . ." (Fed.R.Civ.P. 19(b)).

The guidelines provided by Rule 19 are based upon the principle of *Shields v. Barrow*, 58 U.S. (17 How.) 130, 141 (1855) that "a circuit court can make no decree . . . between the parties before it, which so far involves or depends upon the rights of an absent person" without the joinder of that person.

The principle stated in these treatises is exemplified by *Lawrence v. Sun Oil Co.*, 166 F.3d 466, 469-70 (5th Cir. 1948) where, in a suit between oil land lessees, the absence of their respective lessors was held fatal because the lessors were indispensable parties. To like effect is *Schutten v. Shell Oil Co.*, 421 F.2d 869 (5th Cir. 1970) (A suit to evict an oil operator and for an accounting).

Occidental's attack on the validity of the concession agreement prejudices the interests of Sharjah, Iran and Umm al Qaywayn, and equity and good conscience require dismissal of these actions because of their non-joinder.[17]

[17] Occidental's suggestion (Pet. 24, n. 17) that the relief it seeks—recovery of oil extracted—would not challenge "present sovereignty is specious. The sovereigns' ability to give clear title would be impaired by such relief.

D. The Judgment Below Is Correct Because The Instant Action Is Barred by Operation of Res Judicata.

Occidental seeks a determination that it had the right to explore and exploit the oil field off the coast of Abu Musa, and a further determination that the respondents interfered with Occidental's enjoyment of that right. In the California action, Occidental sought to establish the same right, and to establish that the same alleged conduct of respondents was an interference with such right[18]. In the California action, the respondents' conduct was alleged to be a statutory tort under the federal antitrust laws, and in the instant action it is alleged to be the tort of conversion—under admiralty law in the libel action and under an undisclosed source of law in the diversity actions. In regard to the similarity of the two actions, the Court of Appeals stated that, "The appellants' and appellees' predecessors have once before litigated the underlying basis of this dispute," citing the prior federal court action in California.

If the court had jurisdiction, the application of the doctrine of *res judicata* would have been required, because the instant action and the prior action assert the same cause.

In *Stevenson v. International Paper Co.*, 516 F.2d 103, 109 (5th Cir. 1975), the process of comparing causes of action was described as follows:

> [v]arious tests have been advanced, including Is the same right infringed by the same wrong? Would a different judgment obtained in the second action impair rights under the first judgment? Would the same evidence sustain both judgments?

[18] In the California action, the right which Occidental asserted—an exclusive right to explore and exploit submerged lands off Abu Musa—is described in its Complaint, ¶ 12, Prayer (App. 375-6, 391-2); California District Court, Plaintiff's Memorandum of Points and Authorities, 20 (App. 609). The wrong asserted in the California action—depriving Occidental of enjoyment of the concession rights—is described in its Complaint, ¶¶ 21, 22, 26 (App. 380-85, 396); California District Court, Plaintiff's Memorandum of Points and Authorities, 26 (App. 612-13).

When measured by each of these three tests, the substance of the instant action and the California action is the same.[19]

1. The Same Right Is Infringed By the Same Wrong.

That test was stated in *Baltimore Steamship Co. v. Phillips,* 274 U.S. 316, 321 (1927), as follows:

> A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong.

The substance of the instant action and the California action is the same. The same right is asserted in each — a concession contract with Umm Al Qaywayn to explore and exploit its Persian Gulf oil resources for forty years. The same conduct of respondents is alleged in each — inducing Sharjah and Iran to claim the area and thereby to deprive Occidental of its concession right. The two actions differ only in the labels fixed to the conduct: antitrust tort in the California action and conversion tort in this action. Judged by the same right and wrong test, the instant action should be barred by *res judicata.*

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[19] The result would be the same in the courts of Louisiana, which would regard the actions as petitory. *Allison v. Maroun,* 193 La. 286, 190 So. 408 (1939); *Ramos Lumber & Mfg. Co. v. Labarre,* 116 La. 559, 570-573, 40 So. 898, 902 (1906); See also *Lawrence v. Sun Oil Co.,* 166 F.2d 466, 470 (5th Cir. 1948). The Louisiana Courts would apply the rule that in petitory actions the parties "must set up whatever title or defense they have at their command, or a judgment on that issue will bar a second action based on a right or claim which existed at the time of the first suit, even though omitted therefrom." *Hope v. Madison,* 194 La. 337, 193 So. 666 (1940). See also *Quarles v. Lewis,* 226 La. 76, 81-84, 75 So.2d 14, 16 (1954); *Succession of Whitner,* 165 La. 769, 771-776, 116 So. 180, 181-2 (1928); *Maher v. New Orleans,* 371 F.Supp. 653, 659-70 (E.D.La. 1974), *aff'd,* 516 F.2d 1051 (5th Cir. 1975).

2. A Different Judgment Here Would Impair Rights Under The California Judgment.

A judgment here other than one for respondents would result in a trial of the validity of and reasons for the acts of Iran, Sharjah, Umm Al Qaywayn, and Great Britain. The decision in California, dismissing the action on act of state grounds, was rendered precisely to foreclose and prevent such litigation.

3. The Same Evidence Would Sustain Both Judgments.

This test is answered by examining the record in the two proceedings. In each, Occidental seeks a declaration that the same conduct of respondents is wrongful, i.e., allegedly inducing Sharjah and Iran to claim Abu Musa so as to deprive Occidental of enjoyment of the concession right. The "evidence" supporting the judgment in the California action was Occidental's complaint, which on its face required forbidden inquiry into acts of state. The "evidence" here is Occidental's complaint which likewise on its face requires a judicial inquiry into many of the same acts of state.

Each of the three same-cause-of-action tests results in a bar of the instant action.

E. The Judgment Below Is Correct Because Occidental Is Collaterally Estopped from Raising Outcome—Determinative Issues Decided Against It in the California Action.

Collateral estoppel prevents relitigation of all issues that have been litigated in a prior proceeding, whether or not the causes of action are the same. *International Association of Machinists & Aerospace Workers v. Nix,* 512 F.2d 125 (5th Cir. 1975). For purposes of this discussion only, it is assumed that the prior action and this action somehow do not assert the same cause of action.

For an issue to be concluded by collateral estoppel, that issue must have been the same as the one raised and litigated in the prior action; the issue must have been material and relevant

to the disposition of the prior action; and the determination of the issue in the prior action must have been necessary and essential to the resulting judgment. See *Parker v. McKeithen,* 488 F.2d 553, 557-558 (5th Cir. 1974); *Seguros Tepeyac, S.A., Compania Mexicana v. Jernigan,* 410 F.2d 718 (5th Cir. 1969); *Hyman v. Regenstein,* 258 F.2d 502, 510-11 (5th Cir. 1958), *cert. denied sub nom. Hyman v. Continental Illinois National Bank,* 359 U.S. 913 (1959); 1B Moore, *Federal Practice* ¶ 0.443[1] at 3901 (2d ed. 1974).

Mutuality of estoppel is not required. *Cheramie v. Tucker,* 493 F.2d 586, 589, n.10 (5th Cir. 1974), *cert. denied,* 419 U.S. 868 (1974). The question for purposes of collateral estoppel is whether an issue, the resolution of which is material to the outcome of the instant action, was necessarily decided in the prior one.

Judge Pregerson read the complaint in the prior California action as requiring an adjudication of the acts of state alleged in the pleadings, of Iran, Sharjah, Umm Al Qaywayn and Great Britain. These allegations, according to Judge Pregerson, "would form an integral part of plaintiffs' case" (331 F.Supp. at 112). Judge Pregerson also held that the action alleged that plaintiffs were "deprived of the enjoyment of their concession only by the cooperative effect of a number of acts of state, of which Sharjah's claims were not the most efficacious." (331 F.Supp. at 112.) Thus, the complaint in the prior action was read as calling into question the reasons for and the validity of the acts of the four states in allegedly preventing Occidental from enjoying its concession. The decision in that action was that the act of state doctrine barred the inquiry and that the Hickenlooper exception did not apply.

The Court of Appeals for the Fifth Circuit did not reach this issue. If the issue were reached, Occidental would be estopped from again calling into question the acts of state it challenged before. Occidental would also be estopped from again raising the issue as to whether the Hickenlooper Amendment applied to the acts of state it calls into question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

No. 75-3088

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCCIDENTAL OF UMM AL QAYWAYN, INC.,
Plaintiff-Appellant

v.

CITIES SERVICE OIL CO., ET AL.,
Defendants-Appellees

(Consolidated with)

OCCIDENTAL OF UMM AL QAYWAYN, INC.,
Plaintiff-Appellant

v.

KERR-MCGEE CORPORATION,
Defendant-Appellee

(Consolidated with)

OCCIDENTAL OF UMM AL QAYWAYN, INC.,
Plaintiff-Appellant

v.

A CERTAIN CARGO LADEN ABOARD
"DAUNTLESS COLOCOTRONIS,"
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES, *AMICUS CURIAE*

JAMES W. MOORMAN,
Assistant Attorney General.

BRUCE C. RASHKOW,
Attorney, Department of Justice,
Washington, D.C. 20530.

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CITATIONS

QUESTION PRESENTED

Whether the Act of State Doctrine or some other doctrine bars the adjudication of a controversy between private parties requiring determination of a boundary dispute between foreign nations.

INTEREST

Noting that this case impacts on the Executive Branch, this Court requested the views of the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

The facts in this case are many and complex and are fully set out in the opinion of the district court and in the briefs of the parties before this Court. 396 F.Supp. 461, 464-466; Original Brief on Behalf of Occidental Of Umm Al Qaywayn, Inc., Plaintiff-Appellant (hereinafter Pl.-Appellant Br.), pp. 2-13; Original Brief on Behalf of Cities Service Oil Company, et. al., Defendants-Appellees (hereinafter Defs.-Appellees Br.), pp. 1-14.

This case concerns rights to oil extracted from the seabed of the Persian Gulf in an area located 9 miles off the island of Abu Musa, approximately 40 miles from the shores of the Trucial Sheikhdoms, Umm Al Qaywayn and Sharjah are two neighboring sheikhdoms located on the southeastern coast of the Persian Gulf. Iran is located on the northern side of the Persian Gulf. The island of Abu Musa is located in the Persian Gulf between these three nations. The appellant claims title to this oil pursuant to a concession from Umm Al Qaywayn, contending that its rights to the oil under that concession were illegally confiscated by Sharjah and Iran. Appellees claim title to the oil pursuant to a concession from Sharjah that has apparently been recognized by Iran.

Appellees argue that summary judgment is required in these proceedings on a number of grounds. However, as both the district court and the parties apparently recognize, the principal issue in this litigation is whether Umm Al Qaywayn possessed sovereign rights in the granted appellant's concession in November of 1969. Appellees argue that in order to decide this issue, the Court must resolve a dispute among Umm Al Qaywayn, Sharjah and Iran regarding sovereignty over that area of the seabed.[1] Appellees argue further that the application of the Act of State Doctrine or some other doctrine bars adjudication in our courts of a boundary dispute between foreign nations. Although the district court refused to recognize any special doctrine that restrains a court from deciding a case involving the rights of private parties where the adjudication of those rights requires the determination of such a boundary dispute, it concluded that the Act of State Doctrine applies to bar a resolution of such cases.

It is the position of the United States that the resolution of foreign boundary disputes does not implicate the Act of State Doctrine but that, nonetheless, the Court should not adjudicate this boundary dispute either because the dispute presents a nonjusticiable political question or because there exists a special doctrine restraining the courts from adjudicating such disputes.

ARGUMENT

I

THE RESOLUTION OF A BOUNDARY DISPUTE BETWEEN FOREIGN NATIONS RAISES A NONJUSTICIABLE POLITICAL QUESTION

The district court refused to recognize any special doctrine that restrained the courts from deciding a case involving the

[1] This dispute stems on the one hand from a controversy between Umm Al Qaywayn and Sharjah over a 1964 seabed agreement between them and a subsequent extension by Sharjah of its territorial sea adjacent to Abu Musa and, on the other hand, from a controversy between Sharjah and Iran over ownership of Abu Musa. Iran claims that it owns the island and as a consequence has sovereignty over the disputed seabed, either as part of its 12-mile territorial sea or part of the continental shelf appertaining to the island.

adjudication of a boundary dispute between foreign nations. Instead, the court concluded that where resolution of the boundary dispute requires inquiry into the authenticity and motivations of the acts of the foreign nations, the Act of State Doctrine bars adjudication of the controversy.

The classic American statement of the Act of State Doctrine is found in *Underhill* v. *Hernandez,* 168 U.S. 250:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Notably, the Act of State Doctrine applies only to the public acts of a recognized foreign nation having effect within the territory of that nation. *Pasos* v. *Pan American Airways,* 229 F.2d 271 (1956); *Banco de Espana* v. *Federal Reserve Bank of New York,* 114 F.2d 438 (1940); *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1963); *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 293 F.Supp. 892 (1968). In those cases where the acts did not purport to take effect within the foreign nation, the courts have not applied the Doctrine to bar examination into the validity of those acts. *Zwack* v. *Kraus Bros. & Co.,* 237 F.2d 255 (1956); *Estonian State Cargo & Passenger S.S. Line* v. *United States,* 116 F.Supp. 417, 126 C.Cls. 809 (1953); *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 293 F.Supp. 892 (1968); *Republic of Iraq* v. *First National City Bank,* 241 F.Supp. 567 (1965); *F. Palicio y Compania S.A.* v. *Brush,* 256 F.Supp. 481 (1966), aff'd in part, rev'd in part on other grounds, 485 F.2d 1371, rev'd on other grounds, 425 U.S. 682. However, in the case of a boundary dispute, the relevant acts are the acts of two or more nations, all of which are intended to have effect within the same area, the

disputed territory. The Act of State Doctrine applies only to the acts of the nation having sovereignty over the disputed area—not to the acts of other nations. Consequently, before a court can decide whether the Act of State Doctrine is applicable to bar and examination of any of these acts, it must resolve the boundary dispute.[2] *Williams* v. *Suffolk Ins. Co.*, 38 U.S. 225 (1839); *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1908). Moreover, application of the Act of State Doctrine to a boundary dispute is impractical because the Doctrine requires the Court to give a conclusive presumption of validity to the acts of the foreign nations and rule accordingly.[3] *Ricaud*

[2] In *Williams* v. *Suffolk Ins. Co.*, the Supreme Court was called upon to examine the validity of a seizure of two fishing vessels by Argentina for purposes of resolving insurance claims for the value of the vessels. Argentina claimed that the waters were within its territory. If they were, the Act of State Doctrine would bar examination into the validity of the seizures. The Court, based on an Executive Branch determination that the waters within which the vessels were seized were not within the territory of Argentina, concluded that the Act of State Doctrine did not apply to the seizures and went on to determine that the seizures were illegal and contrary to the law of nations. 38 U.S. 225 (1839). In *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1908), the Court was called upon to examine the motives of Costa Rica in seizing a plantation in order to determine a private antitrust action brought by one private company against another. In order to determine whether the Act of State Doctrine applied so as to bar an examination into the motives of Costa Rica, the Court had to determine whether the seizure occurred within the territory of Costa Rica. It was argued that the plantation was located in a part of Panama unlawfully occupied by Costa Rica. The Court concluded, apparently on the basis of an Executive Branch determination (213 U.S. 347, 358), that Costa Rica was sovereign over the area in question and that the Act of State Doctrine applied to bar an examination of the motives of Costa Rica in seizing the plantation.

[3] Thus, as the Supreme Court held in *Ricaud* v. *American Metal Co.*, the Act of State Doctrine "does not deprive the courts when it is made to appear that the foreign government has acted in a given way on the subject matter of the litigation, the details of such action cannot be questioned but must be accepted by our courts as a rule for decision." In that case, the Court held that the validity of the foreign seizure therein involved could not be questioned and "that the title to

(footnote continued)

v. *American Metal Co.*, 246 U.S. 304 (1918); *Banco Nacional de Cuba Sabbatino*, 376 U.S. 398 (1963). It does not, in our view, require the Court to abstain from ruling on the validity of the acts, as was done by the district court in these proceedings. Thus, the application of the Act of State Doctrine to a boundary dispute would require the Court to treat conflicting acts of state having effect in the same territory (in this case the conflicting claims of Umm Al Qaywayn, Sharjah and Iran) as valid. For this reason, the Act of State Doctrine does not and cannot apply to the resolution of a boundary dispute between foreign nations. This is not to say, however, that no other doctrine exists which restrains the courts from adjudicating such disputes. It is the position of the United States that the Political Question Doctrine bars the courts from adjudicating boundary disputes between foreign nations.

The Supreme Court has recognized that there is a class of questions, the resolution of which was left by the Constitution, not to the courts, but to the other branches of Government. These questions are generally described as political questions. Although we have uncovered no case in which the Supreme Court has specifically held that cases involving boundary disputes raise nonjusticiable political questions, the court has suggested this in dicta. *United States* v. *Texas*, 143 U.S. 621, 638-639 (1892); *Rhode Island* v. *Massachusetts*, 37 U.S. 657, 744-745 (1838). For example, Justice White dissenting in *Banco Nacional de Cuba* v. *Sabbatino*, stated:

(footnote continued)

the property in the case *must be determined* by the result of the action taken by the foreign authorities." (Our emphasis.) In *Banco Nacional de Cuba* v. *Sabbatino*, the Court held that the Act of State Doctrine barred inquiry into the validity of the foreign act of confiscation and remanded the case to the district court, requiring the court to adjudicate the matter, giving a conclusive presumption of validity to the act of confiscation. 376 U.S. 398, 439. The Court in that case described the Act of State Doctrine as a "principle of decision" (376 U.S. 398, 427), and referred to "the presumed validity of the expropriation." 376 U.S. 398, 472.

> * * * without doubt political matters in the realm of foreign affairs are within the exclusive domain of the Executive Branch, as, for example, issues for which there are no available standards or which are textually committed to the executive * * *. These issues include * * * the territorial boundaries of a foreign state, * * *. 376 U.S. 398, 461.[4]

Although the district court rejected the argument that the resolution of the foreign boundary dispute under the circumstances of this case raises a nonjusticiable political question, another court in a private antitrust action arising out of the same circumstances concluded that it does. In *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F.Supp. 92, aff'd 461 F.2d 1261, the court was asked to dismiss the complaint, in part, in the ground that the complaint demanded the court to decide the boundary dispute. The court held that the complaint did not require such an adjudication but concluded in passing that:

> The determination of foreign states' boundaries is certainly not a permissible function of this court. In our system, the questions of what are a country's boundaries, or of what nation has sovereignty over a certain piece of territory, are not for the judiciary to decide; they are political questions, upon which the courts must be guided and bound by pronouncements of the executive. * * * Authoritative judicial resolution of international boundary disputes is a function not of domestic courts, but of international tribunals,

[4] There is dicta in *Williams* v. *Suffolk Ins. Co.*, to the effect that the court might inquire into the sovereignty over disputed territory in the absence of a political branch determination on that question. However, the Executive Branch had made a determination as to sovereignty over the territory in question in that case and the court gave conclusive weight to that determination. *Williams* v. *Suffolk Ins. Co., supra,* pp. 228-229.

> acting upon the consent of the contestant states. * * * (Citations omitted, 331 F.Supp. 92, 103.)[5]

It is the position of the United States that the determination of boundary disputes between foreign nations frequently raises a nonjusticiable political question and that, in any event, the determination of the boundary dispute in this case raises such a question.

The Supreme Court has stressed that the determination that a particular question constitutes a political question requires the concrete evaluation of the circumstances of each case in terms of several factors it has identified as bearing upon that determination. *Baker* v. *Carr,* 369 U.S. 186, 210-211, 217 (1961). One of the factors identified by the court is the impossibility of a court undertaking independent resolution without expressing lack of respect due coordinate branches of Government. *Baker* v. *Carr, supra,* p. 217. Another factor identified by the court as particularly relevant to questions bearing on the conduct of the Nation's foreign relations is the possible consequences of judicial handling. *Baker* v. *Carr, supra,* p. 211. It is the position of the United States that the adjudication of the boundary dispute raised by these proceedings, where the United States has declined to take a position regarding the dispute, would not only express a lack of respect due the Executive Branch in the conduct of the foreign relations of the Nation but would, moreover, ignore the potential adverse consequence of such actions to the foreign relations interests of the Nation.

As the Record in this case suggests, the United States Government has recognized that there exists a dispute as to the ownership of the Persian Gulf island which is the basis of the boundary dispute in this case and has indicated that it does not propose to take a position regarding the claims of the nations

[5] The court concluded that the complaint sought essentially to prove a conspiracy and that proof of that conspiracy required an examination into the motives behind certain public acts of the disputing nations which was forbidden by the Act of State Doctrine and dismissed the complaint on that ground. 331 F.Supp. 92, 107-114.

involved. Appendix, Vol. I, pp. 194-205. More specifically, the Department of State has expressly advised in connection with this litigation that there is a need for unquestionable neutrality by the United States with regard to territorial disputes between foreign nations and that "it would be potentially harmful to the conduct of our foreign relations interests for this court to rule on the territorial issue involved in this case." Letter of May 12, 1978, from Herbert J. Hansell, Legal Adviser, Department of State, to James W. Moorman, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Appendix.

In our view, the position which the Executive Branch has taken on the resolution of this particular boundary dispute should, under the guidelines set down by the Supreme Court for determining the justiciability of a particular question, be dispositive of this case. Nonetheless, the Supreme Court has identified other factors which, if applied to the circumstances of the case, would further support the conclusion that the resolution of this particular boundary dispute raises a nonjusticiable political question.

One of the factors identified by the Court is the possible lack of judicially discoverable and manageable standards for resolving the question. The boundary dispute between Sharjah, Iran, and Umm Al Qaywayn raises complex questions relating to the limits of the territorial sea and continental shelf of a nation under international law. While some of the standards for delimiting the territorial sea have been codified, these standards do not address the issue of the seaward extent of those seas. They address the determination of the coastline from which the limits of the territorial sea, whatever they may be, are extended. Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Pt. 2) 1606. The United Nations Conference, which adopted these standards in 1958, and a special Conference called by the United Nations 2 years later specifically for that purpose, were unable to agree upon the seaward extent of the territorial sea. 4 Whiteman, *Digest of International Law* 94-137. The issue remains unresolved to this

day and is in fact one of the principal issues being addressed at the Third United Nations Conference on the Law of the Sea. See Composite Single Negotiating Text, Art. 3, Third United Nations Conference on the Law of the Sea, United Nations Doc. A/CONF.62/WP.10. That Conference has been dealing with that and other law of the sea issues since 1970. The few international adjudications relating to a determination of the limits of a nation's jurisdiction in the adjacent seas reveal the complexity and difficulty of dealing with such an issue in the present state of international law. E.g., Fisheries Jurisdiction *(United Kingdom* v. *Iceland)*, Merits, Judgment, I.C.J. Reports 1974; Fisheries Case *(United Kingdom* v. *Norway)*, Judgment of December 19, 1951: I.C.J. Reports 1951, p. 116. Moreover, the resolution of this case implicates more than the question of the seaward extent of the territorial sea. It also implicates the delimitation of the continental shelf. The 1958 United Nations Conference, which codified standards for delimiting the territorial sea, also codified standards for delimiting the continental shelves of neighboring nations. Convention on the Continental Shelf, 15 U.S.T. (Pt. 1), 471. However, the Conference did not codify standards that specifically address the resolution of a boundary dispute. Thus, the Convention provides that continental shelf boundaries are to be determined by agreement and in the absence of agreement by the principle of equidistance, unless special circumstances justify another boundary. Convention on the Continental Shelf, *supra*, Art. 6. These principles have not proven effectual in resolving disputes over the delimitation of continental shelf boundaries. E.g., North Seas Continental Shelf Cases (Federal Republic of Germany/Denmark; Netherlands), I.D.J. Reports 1966. Nor has international law developed clear standards outside the terms of the Convention for the resolution of such disputes. North Sea Continental Shelf Cases, *supra*. See also Single Negotiating Text, Art. 83, Third United Nations Conference on the Law of the Sea, *supra*. Because of the obvious uncertainties associated with the still developing area of international law, it is the view of the United States that it would be difficult for a domestic

court to discover the international standards applicable for the determination of a dispute relating to the seaward extent of a nation's territorial waters or its continental shelf boundary with another nation.

Another factor, identified by the Supreme Court as particularly relevant to determining the justiciability of a question relating to the conduct of our foreign relations is the susceptibility to judicial handling of that question in the light of its nature and posture in the specific case. *Baker* v. *Carr,* 369 U.S. 168, 211. Initially, it is the position of the United States that the resolution of boundary disputes between foreign nations raises uniquely political considerations. That consideration aside, it is the view of the United States that there may be great difficulty in the circumstances of this case of ensuring that the evidence necessary to resolve fully and fairly the boundary dispute is between foreign sovereigns, only private litigants are before this Court. Notably, the resolution of a territorial dispute could entail an examination of the acts of the disputing nations reaching far back into history. E.g., *Minquiers and Ecrehos Case,* 1953 I.C.J. Reports.

Thus, it is the view of the United States that an examination of the circumstances of this case in terms of the factors identified by the Supreme Court for determining the justifiability of a particular question establishes that the resolution of the boundary dispute in this case presents a nonjusticiable political question.

II

THE COURT SHOULD ABSTAIN FROM ADJUDICATING FOREIGN BOUNDARY DISPUTES

If this Court concludes that this case does not present a political question, it is our position that the Court should, nonetheless, refrain from adjudicating this dispute, not because the Constitution commands that result, but on principles of judicial abstention. Thus, in the view of the United States,

many of the considerations underlying both the Political Question Doctrine and the Act of State Doctrine, strongly urge the recognition by the courts of a special doctrine relating to foreign boundary disputes. Under this doctrine, the courts should abstain from passing upon the validity of the public acts of foreign nations relating to a boundary dispute where the political branches of Government have "abstained" from taking a position in that dispute—rather than giving a presumptive conclusion of validity to those acts, as required by the Act of State Doctrine.

The Supreme Court has made clear that the Act of State Doctrine rests on principles of judicial abstention rather than on international law or constitutional commands, and that it thus constitutes a limited exception to the ordinary obligation of courts to adjudicate cases and controversies over which they have jurisdiction. *Banco Nacional de Cuba* v. *Sabbatino, supra,* pp. 421-423. *The Paquete Habana,* 175 U.S. 677; *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759, 763 (plurality opinion). The Court has described two related considerations underlying the Doctrine: (1) the absence of settled or ascertainable legal standards by which to judge the validity of foreign acts; and (2) the risk of embarrassment or interference with the conduct of the nation's foreign relations. See *Banco Nacional de Cuba* v. *Sabbatino, supra,* pp. 427-428; *First National City Bank* v. *Banco Nacional de Cuba, supra,* p. 763 (plurality opinion), and 774 (Justice Powell's opinion). Moreover, where the act is being challenged as invalid under international law, as here, the Court has identified the following factors as bearing upon the application of the Act of State Doctrine: "the degree of codification and consensus concerning a particular area of international law," whether aspects of international law which "touch more sharply on national nerves than do others" are involved, how important the implications of an issue are for our foreign relations," whether "the government which perpetrated the challenged act of state is no longer in existence," 376 U.S. 398, 427-428. These factors are strikingly similar to the factors the court has identified as bearing

upon the application of the Political Question Doctrine. *Supra,* pp. 7-15. Our previous analysis of these factors in terms of the particular circumstances of this case demonstrates that the Court should refrain from adjudicating the foreign boundary dispute involved in these proceedings.

In the view of the United States, the considerations which led the Court to recognize a limited exception under the Act of State Doctrine to their ordinary obligation to adjudicate cases and controversies over which they have no jurisdiction, apply as well to the resolution of foreign boundary disputes. Consequently, if the Court were to conclude that the resolution of the boundary disputes in this case does not rise to the level of a political question, these same considerations warrant the recognition of a doctrine which restrains the courts from adjudicating such disputes based not on constitutional commands but on the principle of judicial abstention.

CONCLUSION

For the foregoing reasons, the Complaint in this case should be dismissed.

Respectfully submitted,

JAMES W. MOORMAN,
Assistant Attorney General.

BRUCE C. RASHKOW
Attorney, Department of Justice,
Washington, D.C. 20530.

May 1978

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

May 12, 1978

Honorable James W. Moorman
Assistant Attorney General
Land and Natural Resources Division
Department of Justice
Washington, D.C.

Dear Mr. Moorman:

Your Division has asked for our views concerning certain aspects of the case of *Occidental of Umm Al Qaiwain, Inc. v. A certain Cargo of Petroleum Laden Aboard the Tanker "Dauntless Colocotonic," Etc., et. al., C.A. 5, No. 75-3088.*

It is our understanding that the disposition of this case would require a determination of the disputed boundary between Umm Al Qaiwain on the one hand and Sharjah and Iran on the other at the time Umm Al Qaiwain granted the concession in issue to Occidental. It is our view that it would be contrary to the foreign relations interests of the United States if our domestic courts were to adjudicate boundary controversies between third countries and in particular that controversy involved here.

The extent of territorial sovereignty is a highly sensitive issue to foreign governments. Territorial disputes are generally considered of national significance and politically delicate. Even arrangements for the peaceful settlement of territorial differences are often a matter of continued sensitivity.

These considerations are applicable to the question of Umm Al Qaiwain's sovereignty over the continental shelf surrounding Abu Musa at the time of the concession to Occidental and to the subsequent arrangements worked out

among the affected states. For these reasons, the Department of State considers that it would be potentially harmful to the conduct of our foreign relations were a United States court to rule on the territorial issue involved in this case.

We believe that the political sensitivity of territorial issues, the need for unquestionable U.S. neutrality and the harm to our foreign relations which may otherwise ensue, as well as the evidentiary and jurisprudential difficulties for a U.S. court to determine such issues, are compelling grounds for judicial abstention.

We do not believe that this judicial self-restraint should turn on such analytical questions as whether the so-called Act of State doctrine which is traditionally limited to governmental actions within the territory of the respective state can apply to an exercise of disputed territorial jurisdiction. It rather follows from the general notion that national courts should not assume the function of arbiters of territorial conflicts between third powers even in the context of a dispute between private parties. As a result, we are of the view that the court should be encouraged to refrain from setting the extent of Umm Al Qaiwain's sovereign rights in the continental shelf between its coast and Abu Musa at the time of its grant of the concession to Occidental.

Sincerely,

HERBERT J. HANSELL

APPENDIX B

COPY OF PAGE 34 OF DEFENDANTS' STATEMENT OF REASONS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS ACTION, IN OCCIDENTAL OF UMM AL QAYWAYN, INC. v. A CERTAIN CARGO OF PETROLEUM LADEN ABOARD THE TANKER "DAUNTLESS COLOCOTRONIS", CIV. NO. 74-868, W.D.LA., LAKE CHARLES DIVISION (FILED NOV. 6, 1974)

409 U.S. 950, 93 S.Ct. 272 (1972). One passage in that case, which we have already quoted, bears repetition here:

> "Regardless of the wording of the complaint, it would be conceptually and prudentially hazardous to treat the territorial waters claims of Sharjah as a "confiscation," subject to adjudication under the international legal standards governing that kind of act. Claims to territory are a different matter from the expropriation of corporate property within or appertaining to that territory. (citation omitted). Moreover, territorial waters claims are subject to a body of international law wholly different from that relating to expropriations." (Citations omitted)

Inasmuch as the action requires an inquiry barred by the act of state doctrine, it fails to state a claim upon which relief can be granted, and must be dismissed.

B. The Action Should be Dismissed Because it Would Require Adjudication of a Boundary Dispute Between Foreign Nations, Which This Court Lacks Jurisdiction to Make.

Plaintiff claims the oil at issue herein on the basis of its claim of exclusive right, under a concession from Umm Al Qaywayn to exploit the oil resources of the precise area from which the oil was produced by Buttes and its joint venturers, under a concession agreement from Sharjah. The two concession agreements overlapped, as the complaint indicates, because there is an overlap between Umm Al Qaywayn's continental shelf claim to the area, and Sharjah's territorial sea and continental shelf claims to the area. Iran also has made a

territorial sea claim to the area. The complaint makes no claim that Umm Al Qaywayn and Sharjah have resolved this dispute as to the location of their common boundary, or that Iran's claim has been resolved with Umm Al Qaywayn, or even that Umm Al Qaywayn continues to claim ownership of the area.

If the disputed area is not within Umm Al Qaywayn's boundaries plaintiff will have been deprived of none of the oil resources in the disputed area because it will have been entitled to none. For

34 (Continued)

APPENDIX C

COPY OF PAGE 27 OF DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS OR FOR SUMMARY JUDGMENT, IN OCCIDENTAL OF UMM AL QAYWAYN, INC. v. A CERTAIN CARGO OF PETROLEUM LADEN ABOARD THE TANKER "DAUNTLESS COLOCOTRONIS," CIV. NO. 74-868, W.D.LA., LAKE CHARLES DIVISION FILED APR. 4, 1975

"continental shelf" as referring:

> (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres of, beyond that limit, to where the depth of the superjacent waters admits of the exploration of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

And Article 2 provides:

> 1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
>
> 2. *The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.*
>
> 3. *The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.*
>
> 4. The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at

the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil. (Emphasis added).

Thus neither Sharjah nor Iran had to make express claims of continental shelf rights for Abu Musa. Their long-standing claims to the Island were by themselves sufficient to manifest their claims for its adjacent continental shelf.

It should also be noted that Occidental's assertion that the boundary dispute did not arise until after it received a concession and discovered a prospect of oil (Plantiff's Brief, p. 16) makes approximately November 18, 1969 (the date on which Occidental was granted its concession) as the latest date on which, in Occidental's estimation, Sharjah could have asserted a timely claim to